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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY FRANK GIELLA,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court's denial of a defendant's request for use immunity for a severed co-defendant violates the defendant's Sixth Amendment Right to compulsory process and Fifth Amendment Right to due process of law insuring a fair trial.

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I. The District Court's denial of Petitioner's request for use immunity for a severed co-defendant presents a conflict among the Circuit Courts of Appeal; and raises a signficant issue involving substantial constitutional rights specifically the Fifth and Sixth Amendment to the Constitution of the United States of America.

A. The decision below conflicts with decisions of other Circuit Courts of Appeal which have approved and in fact required the District Courts to grant the request for use immunity in order to insure that a defendant's Fifth and Sixth Amendment Rights are fully protected.

B. This issue and the decision below directly affects a defendant's constitutional right to compulsory process as guaranteed by the Sixth Amendment to the Constitution of the United States of America and also directly affects a defendant's Fifth Amendment right to due process of law insuring a fair trial.

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The Petitioner, ANTHONY FRANK GIELLA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 2, 1982.

CITATION TO OPINION BELOW

The opinion in the United States Court of Appeals for the Fifth Circuit in this case is cited as United States vs. Heffington, 582 F.2d 1075 (5th Cir. 1982), and the opinion appears as an Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 2, 1982, a timely petition for rehearing was denied on August 30, 1982, and this Petition for Certiorari was filed within sixty days of that date in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RULES AND STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the

following Statutes is set forth in Appendix B hereto.

United States Constitution, Amendment V

United States Constitution, Amendment VI

STATEMENT OF THE CASE

The Petitioner and three other individuals were indicted by a Grand Jury for the Northern District of Texas on the twenty-sixth day of March, 1981. All four were charged in a thirteen-count indictment with conspiracy (18 U.S.C. §371), wire fraud (18 U.S.C. §1343) and inducement to travel in interstate commerce in furtherance of a fraud (18 U.S.C. §2314). After entry of "not guilty" pleas at arraignment, the Trial Court held pre-trial hearings on the seventh day of May, 1981. Trial commenced on the nineteenth day of May, 1981; said trial resulting in a conviction of the Petitioner on all

thirteen counts of the indictment. Petitioner filed his notice of appeal on the twenty-sixth day of June, 1981. The judgment of the Fifth Circuit Court of Appeals was entered on the second of August, 1982, in an opinion authored by Judge Garza affirming the conviction. A petition for rehearing was denied August 30, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Petitioner, on appeal, contended that the Trial Court's denial of his motion for judicial use immunity for a severed co-defendant violated Petitioner's Sixth Amendment Right to compulsory process and his Fifth Amendment Right to due process of law. The Fifth Circuit Court of Appeals in its opinion rejected the defendant's claim that the requirements of Government of Virgin Islands vs. Smith, 615 F.2d 964

(3rd Cir. 1980), had been met and the Trial Court should have granted the defendant's request. That decision is in conflict with the Third Circuit Court of Appeals.

The facts of this case arise from a series of transactions in which Petitioner and the other individuals played a part in an attempted sale of gold bullion during the last five months of 1980. The moving party on this series of events was co-defendant William "Billy" Carr. Mr. Carr filed a motion to sever prior to trial. It was granted by the Court and he was not tried with the Petitioner and the other two co-defendants. The basis of the transactions which formed the basis of the indictment involved Billy Carr providing a large amount of gold, which was in his possession and which were to be sold by defendants Heffington and White to

investors. The gold was stored at the Broward Commercial Warehouse in Fort Lauderdale Florida. That warehouse was operated by Petititoner Anthony Giella. According to Petitioner, Carr showed him a bar from one of many cases delivered to the warehouse. It appeared to be gold bullion and Carr told Petitioner it was gold. From this point throughout the entire series of transactions, Petitioner asserted that he at all times believed and relied upon the co-defendant Carr as to the accuracy and authenticity of any statements or representations made concerning said product. The entire series of transactions, from the beginning until the end in January of 1981, centered and revolved around co-defendant Billy Carr.

The Petitioner's position in his motion for a grant of use immunity was based on

the belief that only Billy Carr could and would give exculpatory evidence relieving the Petitioner of any criminal liability in any of the transactions since he was the only person upon whom Petitioner relied. However, since Mr. Carr was named in the indictment, he had a right to assert his Fifth Amendment privilege against self-incrimination and would only testify for Petitioner under a grant of use immunity. The Petitioner, relying upon the case of Government of Virgin Islands vs. Smith, supra, met all of the factual requirements of that case which would have authorized the Trial Court granting the motion for use immunity. The Trial Court's denial of said motion effectively barred co-defendant Carr's critical testimony from use by Petitioner in his trial and directly

affected his ability to defend himself against the charges.

REASONS FOR GRANTING CERTIORARI

I.

The District Court's denial of Petitioner's request for use immunity for a severed co-defendant presents a conflict among the Circuit Courts of Appeal; and raises a signficant issue involving substantial constitutional rights specifically the Fifth and Sixth Amendment to the Constitution of the United States of America.

A. The decision below conflicts with decisions of other Circuit Courts of Appeal which have approved and in fact required the District Courts to grant the request for use immunity in order to insure that a defendant's Fifth and Sixth Amendment Rights are fully protected.

The Petitioner, prior to trial, formally requested that the severed co-defendant Billy Carr be given judicial immunity by the Trial Court so that he would be available to testify for Petitioner in his trial. Petitioner, relying upon Government of Virgin Islands vs. Smith, 615 F.2d 964 (3rd Cir. 1980), made a record presenting factual evidence satisfying the requirements which that Court held were necessary before any court could grant judicial use immunity to a co-defendant.

Those requirements are:

1. The defendant must properly request the Trial Court, prior to trial, for a grant of immunity naming the witness and the nature of the testimony sought.

2. The defendant must show to the Trial Court that the witness is physically available to testify and would testify with

a grant of judicial immunity and would not be available, i.e., would exercise his Fifth Amendment Right without it.

3. The evidence sought from the witness must be clearly exculpatory.

4. The testimony of the witness must be essential to the defendant's case.

5. The Government must have no strong countervailing interest.

The record in the Trial Court satisfied all of the requirements set out above. The Trial Court after conducting the evidentiary hearing on Petitioner's motion denied the request and that ruling was approved by the Fifth Circuit Court of Appeals.

The Third Circuit Court of Appeals in United States vs. Herman, 589 F.2d 1191 (3rd Cir. 1978), in deciding the issue of

the appropriateness of granting judicial immunity stated:

A case might be made that the Court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense. [at 1204]

In Government of Virgin Islands vs. Smith, supra, the Third Circuit held that if a defendant properly establishes the above set out five requirements, Chambers vs. Mississipppi, 410 U.S. 284, 93 S.Ct. 1038 (1973), may require the use of judicially fashioned immunity to insure due process of law. In that case they said that judicial use immunity should have been given and reversed the case. The Third Circuit has followed the decision of Government of Virgin Islands vs. Smith,

supra, in subsequent cases and that remains the status of the law in that Circuit.

The Second, Fourth, Sixth, and Ninth Circuits have addressed the issue of judicial use immunity and while denying it in the specific case before them, have left the door open as to whether or not immunity would ever be available. See United States vs. Turkish, 623 F.2d 769 (2nd Cir. 1980); United States vs. Klauber, 611 F.2d 512, (4th Cir. 1979); United States vs. Lenz, 616 F.2d 960 (6th Cir. 1980); United States vs. Alessico, 528 F.2d 1079 (9th Cir. 1976).

The Fifth, Seventh, Eighth and D.C. Circuits have addressed the issue of judicial use immunity and rejected a trial court's right to grant use immunity. See United States vs. Chagra, 669 F.2d 241

(5th Cir. 1982); United States vs. Thevis, 665 F.2d 616 (5th Cir. 1982); In Re: Daley, 549 F.2d 469 (7th Cir. 1976); United States vs. Graham, 548 F.2d 1302 (8th Cir. 1976); Pearl vs. United States 361 F.2d 531 (D.C. Cir. 1966).

It is clear that the issue of judicial use immunity is being raised more and more frequently in the courts throughout the United States. In Petitioner's case this Honorable Court has a unique opportunity to address the issue squarely with a record below that is factually complete and specifically addressed to the issue of the granting of judicial use immunity. Contrary to cases decided in the other circuits and cases where certiorari has been denied, Petitioner believes that this case presents factually and legally the issue in clear context. Thus, this Court

should grant this Petition for Writ of Certiorari and deal directly with this very critical issue.

B. This issue and the decision below directly affects a defendant's constitutional right to compulsory process as guaranteed by the Sixth Amendment to the Constitution of the United States of America and also directly affects a defendant's Fifth Amendment right to due process of law insuring a fair trial.

The Petitioner both at the Trial Court level and the Fifth Circuit Court of Appeals level specifically raised the issue of the denial of his Sixth Amendment Right to compulsory process and his Fifth Amendment Right to due process of law. The record is complete and the issue was properly presented to the Trial Court and the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals subsequent to the Trial Court's decision in Petitioner's case in United States vs. Thevis, supra, decided that the Fifth Amendment Right to due process did not require or authorize a Trial Court to grant judicial use immunity.

Subsequent to the Trial Court's decision in Petitioner's case the Fifth Circuit Court of Appeals in United States vs. Chagra, supra, address the issue of the right of compulsory process being violated by a Trial Court's denial of the request for a grant of judicial use immunity and determined in that case that there is no violation of a defendant's Sixth Amendment Rights by a Trial Court's denial of such a request.

However, in Government of Virgin Islands vs. Smith, supra, the Third

Circuit Court of Appeals specifically held that the Fifth Amendment Right to due process of law insuring a fair trial required the use of judicially fashioned immunity for a co-defendant in order to insure that the defendant at the trial level receive a fair trial.

The Court in United States v. Turkish, supra; United States vs. Klauber, supra; United States vs. Lenz, supra; United States vs. Alessico, supra, while specifically rejecting the request in those cases held that Chambers vs. Mississippi, supra, might require the use of judicially fashioned immunity to insure that a person's Fifth Amendment Right to due process of law be protected.

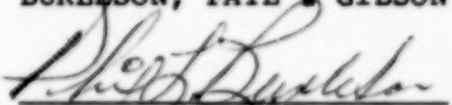
Therefore, the conflicting opinions throughout the various Circuit Courts of Appeals on these two constitutional rights

creates significant confusion at the Trial Court level and causes significant adverse affects on the litigants before those courts. Thus, this Court has a unique opportunity and almost an obligation to once and for all settle this issue concerning the Fifth and Sixth Amendment Rights of defendants.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,
BURLESON, PATE & GIBSON



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Mr. Richard Stephens, Assistant United States Attorney, 1100 Commerce Street, Dallas, Texas 75242; Mr. Wade Hampton McCree, Jr., Solicitor-General, Department of Justice, Suite 5143, Ninth and Constitution Avenue, N.W., Washington, D.C. 20530, on this the 16 day of November, 1982.

PHIL L. BURLESON
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